Supreme Court, U.S.
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No. 90-1154

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS JAMES SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
WILLIAM S. ESTABROOK
DORIS D. COLES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether judgment was properly entered against petitioner under Section 6672 of the Internal Revenue Code of 1954 as a responsible person who willfully failed to remit withholding taxes owed to the government by a corporate employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 910 F.2d 1289. The order of the district court (Pet. App. A13-A14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1990. A petition for rehearing was denied on October 19, 1990 (Pet. App. A11). The petition for a writ of certiorari was filed on January 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Shannon Advertising, a Texas corporation, was owned in equal shares by petitioner Louis Scott, Michael

McCray, Leonard Raines and Andrew Martin. These four individuals were also officers and directors of the corporation. Shannon Advertising failed to remit withholding taxes owed to the government for the first three quarters of 1982. The company thereafter ceased doing business. Pet. App. A4.

2. Pursuant to Section 6672 of the Internal Revenue Code, the IRS assessed the unpaid taxes for the first quarter of 1982 ($18,672.40) against McCray, and assessed the unpaid taxes for the first, second, and third quarters of 1982 ($56,511.40) against petitioner Scott, Raines and Martin. The IRS determined (i) that each of these individuals was a person responsible under Section 6672 for seeing that Shannon Advertising properly paid withholding taxes to the government for the quarters assessed and (ii) that each individual had willfully failed to do so. Pet. App. A4.

3. McCray paid part of the amount assessed against him and sued for a refund. The United States counterclaimed against McCray for the remaining amount assessed and impleaded petitioner Scott, Raines and Martin, seeking judgment against each of them for the full amount of the withholding taxes due. The claims involving McCray were settled and dismissed, and an agreed judgment was entered against Martin in the amount of $52,832.40 ($56,511.40 less a credit of $3,679). Pet. App. A4. The district court thereafter granted summary judgment in favor of the government against petitioner Scott and Raines, finding that each was a responsible person who willfully failed to pay the employment taxes of Shannon Advertising during the first three quarters of 1982. The judgment entered against petitioner was in the amount $49,233.63, which represented the full assessment of $56,511.40 less credits of $7,286.77 plus fees of $9.[1] The judgment entered against Raines

[1] The credits against the assessment were due to offsets against his income tax refunds for later years. No negligence penalties under Section 6653 have been assessed against petitioner.

was for the full amount of the assessment.[2] Pet. App. A13-A14.

4. The court of appeals affirmed the decision of the district court, holding that petitioner was a person responsible for the payment of the withholding taxes under Section 6672. With respect to the *amount* of the judgment entered against petitioner, the court of appeals held that, since responsible persons are jointly and severally liable for the full amount of the delinquent taxes under Section 6672, the IRS may obtain a judgment for the full amount against each responsible person and thereafter administratively abate the amount of the judgment by the amount of uncontested payments ultimately received from other responsible persons (Pet. App. A7-A10).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

Petitioner now concedes (Pet. 10) that he is a responsible person liable for a penalty assessment under Section 6672 of the Code. Petitioner argues, however, that the district court erred by entering a judgment for the IRS that did not credit petitioner with amounts (totalling $4,429) that had been paid by others. The judgment entered against him, however, comports with the provisions of Section 6672 of the Code. Section 6672 imposes a penalty on each responsible person equal to the amount of the withholding taxes not paid over to the government. Responsible persons are jointly and severally liable for these taxes, and the govern-

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[2] Neither Martin nor Raines has appealed from the judgments entered against them.

ment may seek full recovery from any or all of them until the delinquent taxes are uncontestably satisfied. *Brown* v. *United States*, 591 F.2d 1136, 1142 (5th Cir. 1979); *Hartman* v. *United States*, 538 F.2d 1336, 1340 (8th Cir. 1976). The government may thus simultaneously pursue collection of the total tax delinquency from each responsible person. The district court therefore properly entered judgment against petitioner for the total amount due less the amount that he personally had already paid. See *Quattrone Accountants, Inc.* v. *IRS*, 895 F.2d 921, 926-927 (3d Cir. 1990) ("[a]lthough the policy of the IRS is to not collect more than 100% of the taxes owed * * * each person responsible under Section 6672 is liable for that 100%").

The government does not, however, seek ultimately to collect more than the entire amount of the withholding taxes due. It is the established policy of the Internal Revenue Service to utilize Section 6672 of the Code as a collection device to obtain payment of delinquent withholding taxes and not as a punitive measure. Accordingly, while the IRS has made multiple assessments under Section 6672 in an attempt to collect the same withholding taxes from each of the responsible persons, those assessments are administratively abated once the government has finally collected the entire amount of withholding taxes owed. See *United States* v. *Sotelo*, 436 U.S. 268, 279-280 n.12 (1978); *USLIFE Title Insurance Co. of Dallas* v. *Harbison*, 784 F.2d 1238, 1240 (5th Cir. 1986) ("Once the Government's right to retain one full satisfaction is secure * * * its policy is to refund all amounts in excess of the total delinquency."); *Gens* v. *United States*, 615 F.2d 1335, 1339 (Ct. Cl. 1980); Policy Statement P-5-60, [1 Admin.] Internal Revenue Manual (CCH) at 1305-14 (approved May 30, 1984).

Since there is an administrative remedy for the refund of overpayments (see [2 Admin.] Internal Revenue Manual (CCH) ¶¶ 5755.3-5755.4, at 7317-7318), the court of

appeals correctly refrained from devising a further remedy for petitioner. An overpayment has not yet occurred in this case. Petitioner has therefore not been denied the administrative relief to which he is entitled if an overpayment occurs in the future. Petitioner's claims are therefore premature. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Hessbrook* v. *Lennon*, 777 F.2d 999, 1003 (5th Cir. 1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
WILLIAM S. ESTABROOK
DORIS D. COLES
Attorneys

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